UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III its Department of Health, and its Pollution Control Agency

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAK CONDOMINIUM INC.; and PHILIP'S INVESTMENT CO.,

Defendants.

Civil No. 4-80-469

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

MEMORANDUM OF THE UNITED STATES CONCERNING THE LEGAL AUTHORITY TO RECOVER ITS PAST COSTS FROM THE REILLY TAR AND CHEMICAL CORPORATION

INTRODUCTION

In this case, the United States is asking the court to order Reilly to implement a remedy to clean-up the hazardous substances released by Reilly into the environment. The United States is also asking that this Court order Reilly to reimburse the United States for approximately $2.3 million dollars in clean-up costs which have already been spent by the United States in responding to the release at the Reilly site. */ This memorandum discusses the legal authority entitling the United States to reimbursement of its past costs. This memorandum also describes the kinds of past costs incurred by the United States at the Reilly site and discusses why the United States is entitled to reimbursement of those costs.

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*/ The United States has already expended over $2.3 million in response costs at the Reilly site. The State of Minnesota also has incurred substantial past costs in connnection with the Reilly site. Those costs are not discussed in this memorandum. However, it should be emphasized that the $2.3 million in past costs discussed here are only the costs of the United States, not other plaintiffs.

I. Legal Authority for the United States' Claim for Past Costs

A. Section 107(a) of CERCLA Expressly Authorizes the United States to Recover Its Past Costs

Congress, in section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9607(a), provided for the United States' right to recover from a defendant its costs in responding to a release or threatened release of hazardous substances into the environment. Section 107(a) provides:

> (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -
>
> . . .
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> . . .
>
> from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

In construing section 107(a) of CERCLA, Judge Magnuson has ruled that:

> [t]he statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.

United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

The cost-recovery provisions of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), are particularly important because the Superfund itself is unable to clean up more than a small fraction of the hazardous waste sites in need of remedial action. In 1980, when Congress adopted CERCLA, both the House and Senate recognized that the 1.6 billion dollar Superfund would not be adequate to handle the enormous number of waste sites throughout the country. The Senate Environment and Public Works Committee estimated there were more than 2,000 chemical dumpsites posing threats to public health that would cost an average of $3.6 million per site to clean up. S. Rep. No. 96-848, 96th Cong., 2d Sess., at 2 (1980). */

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*/ The Senate Committee also found that "the problem is much broader than those incidents involving disposal of hazardous substances." Id. at 5. It extends to "the closely related problems of [accidental] spills and other releases of dangerous chemicals which can have an equally devastating effect on the environment and human health." Id.

At that time, the Senate considered a fund as large as $4 billion (as enacted, CERCLA provides for only $1.6 billion over five years). Even with $4 billion, the Senate concluded: "[a]t this level of funding, response will not be possible at a large number of releases posing imminent or substantial threats to public health or the environment." Id. at 17.

The House Committee on Interstate and Foreign Commerce made similar findings when reporting out the House bill precursor to CERCLA. H. Rep. No. 96-1016 -- Part I, 96th Cong., 2d Sess., at 18-21. The House Committee cited an EPA study in 1979, which estimated that as many as 30,000 to 50,000 hazardous waste sites existed, of which between 1,200-2,000 presented a serious risk to public health. Id. at 18. At that time, an EPA report estimated that it would cost between $13.1 and $22.1 billion to clean up all hazardous wastes that posed a danger to public health and the environment. Id. at 20.

The House Ways and Means Committee and the Senate Commerce Committee which considered the precursor bills to CERCLA clearly indicated that those responsible for any damage to public health or the environment should bear the costs of their actions and that the Fund should be used to the extent possible for the situations where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup

and compensation. H. Rep. No. 96-1016 -- Part II, 96th Cong., 2d Sess. at 5; S. Rep. No. 96-848, 96th Cong., 2d Sess. at 13. Accordingly, it is essential to CERCLA's effectiveness as a tool to respond to hazardous waste sites throughout the country, that where a solvent responsible party is found, that party, rather than the Superfund, should bear the response costs.

The standard of liability under Section 107(a) is strict liability. Judge Magnuson has held that section 107(a) creates absolute or strict liability. United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1118 (D. Minn. 1982). Other courts which have construed the section have similarly held that section 107(a) creates strict liability. */ United States v. Northeastern Pharmaceutical & Chemical

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*/ Under the concept of strict liability, a defendant is liable "although he has exercised the utmost care to prevent the harm, "Restatement (Second), Torts, § 519, and "although he has taken every possible precaution to prevent the harm, and is not at 'fault' in any moral or social sense." W. Prosser, Law of Torts, (4th Ed. 1971), at § 79, p. 517. Under Sections 107(a) and 107(b) of CERCLA, questions of fault are irrelevant to finding Reilly liable for response costs of United States.

Co., 579 F. Supp. 823, 843-844 (W.D. Mo. 1984) appeal pending (8th Cir.); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983); United States v. South Carolina Recycling & Disposal, Inc., 14 ELR 20272, 20274 (D.S.C. 1983); United States v. Conservation Chemical Co., 20 ERC 1427, 1430 (W.D. Mo. 1984;) United States v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983).

B. Reilly Is Liable For All Costs of Removal and Remedial Action Incurred By The United States

Section 107(a) provides that a responsible party shall be liable for "[a]ll costs of removal or remedial action incurred by the United States government or a State not inconsistent with the national contingency plan." Section 101(23) of CERCLA 42 U.S.C. §9601(23) defines the term removal:

> (23) "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, ... action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974; (Emphasis supplied).

The definition of removal includes, by reference, the actions listed in section 104(b) of CERCLA, 42 U.S.C. §9604(b):

> (b) Whenever the President is authorized to act pursuant to subsection (a) of this section, . . . he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Act.
>
> (Emphasis supplied).

Remedial action is defined in section 101(24) of CERCLA, 42 U.S.C. §9601(24):

> (24) "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Under the explicit language of the statute, the United States is entitled to recover the costs of investigation and monitoring of hazardous waste sites ("such actions as may be necessary to monitor, assess and evaluate the release of . . . hazardous substances"), the costs of designing a remedy ("the President may undertake such planning ... engineering, architectural, and other studies or investigations ... to plan and direct response actions"), the actual costs of a remedy, and the legal and enforcement expenses incurred in seeking to recover its costs from a responsible party "the President may undertake such planning, legal ... and other studies and investigations to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of the Act."

Based on this express language, courts have held that the United States is entitled to recover from a responsible party its investigatory costs and its costs in planning and implementation of a remedy. United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984); United States v. Wade, 577 F. Supp. 1326, 1333 n. 4 (E.D. Pa. 1983); New York v. General Electric Co., 21 ERC 1097, 1103 (N.D.N.Y. 1984). Courts have also held that the explicit language of section 104(b) entitles the United States

to recover its litigation costs from a liable defendant. In United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984), the court found "that CERCLA specifically allows for the recovery of attorney fees." Accord, United States v. Cauffman, No. CV 83-6318 Kn (Bx) (C.D. Cal. Sept. 26, 1984) ("plaintiff United States of America is entitled to recovery for attorney's fees incurred as a result of bringing this cause of action.)

The broad cost recovery rights of the government are summarized by the court in United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. 823, 851:

> [U]nder CERCLA, the defendants are jointly and severally liable for, and the plaintiff is entitled to recover, all litigation costs, including attorney fees, incurred by plaintiff. The Court further finds that the defendants are jointly and severally liable to the plaintiff for all costs, including salaries and expenses, incurred by the plaintiff associated with such activities as monitoring, assessing and evaluating the release of contaminants and the taking of actions to prevent, minimize or mitigate damage which might result from a release or threat of release of contaminants from the Denney farm site." (Emphasis supplied)

C. The Requirements of the National Contingency Plan

Under section 107(a) of CERCLA, 42 U.S.C. § 9607(a), in order for the United States' to recover costs from a responsible party, the United States' costs must be "not inconsistent with National Contingency Plan." The National Contingency Plan ("NCP") is promulgated pursuant to section 105

of CERCLA, 42 U.S.C. §9605, and codified at 40 C.F.R. Part 300. The NCP establishes guidelines for the United States and the States in responding to releases of hazardous substances into the environment. The NCP calls for a preliminary assessment of a release of hazardous substances, 40 C.F.R. §300.64, and allows for immediate or planned removal of hazardous substances, as appropriate. 40 C.F.R. §§300.65, 300.67. The NCP also calls for the evaluation of further action, including long term remedial measures, and provides a process through remedial investigation and feasibility study to select a remedy. 40 C.F.R. §§300.66, 300.68.

The government does not bear the burden of proving that its costs are consistent with the NCP. Because Section 105 of CERCLA, 42 U.S.C. § 9605, states that the government may recover all costs "not inconsistent with" the NCP, the courts have ruled that the burden is on the defendant to prove that government costs are inconsistent with the NCP. In United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984), the court concluded that the defendant bore the burden of proving inconsistency with the NCP:

> Defendants argue that the plaintiff failed to prove that the costs incurred were reasonable and "not inconsistent with the national contingency plan." Initially, the Court finds that the burden of proving inconsistency with the national contingency plan was that of the defendants. This conclusion is evident from the language of the statute. To give meaning to every term

> in the statute, the Court reads the insertion of the word "not" immediately prior to "inconsistent" to mean that the defendants are presumed liable for all response costs incurred unless they can overcome this presumption by presenting evidence of inconsistency. (Emphasis supplied)

See New York v. General Electric Co., 21 ERC 1097, 1103 (M.D. N.Y. 1984).

The government also need not prove that its costs were reasonable; costs incurred under the NCP are presumed to be reasonable. In United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984), the court held that:

> Reasonableness is conclusively presumed to have been built into the plan since one of the guidelines expressed by Congress was that the plan provide a "means of assuring that remedial action measures are cost-effective over the period of potential exposure ..." Section 105(7). As long as the actions taken by the government were in harmony with the national contingency plan, the costs incurred pursuant to those actions are presumed to be reasonable and therefore recoverable. If Congress has intended otherwise, they would have merely stated in section 107(a)(4)(A), "all reasonable costs," instead of the present language of "all costs." (Emphasis supplied).

Accord, United States v. Conservation Chemical Co., 20 ERC 1427, 1432 n. 4 (W.D. Mo. 1984).

D. The Government Is Entitled to Pre-Judgment Interest On Its Past Costs

Finally, the United States is entitled to recover prejudgment interest on its past costs. Courts have held that in the absence of specific statutory language, "the decision to grant or deny prejudgment interest should hinge on whether to do so would further the congressional purpose underlying the obligations imposed by the statute in question." Bricklayers' Pension Trust Fund v. Taiariol, 671 F. 2d 988, 989 (6th Cir. 1982), citing Rodgers v. United States, 332 U.S. 371, 373 (1947). In United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 852 (W.D. Mo. 1984), the court held that an award of prejudgment interest under CERCLA would be proper, reasoning that:

> In determining this issue, the Court must be mindful of the Congressional intent to impose liability on those responsible parties for "all costs" incurred in taking remedial and removal action. It was the intent of Congress that CERCLA be given a broad interpretation so as not to restrict the liability of those responsible parties. It is also well established that prejudgment interest is compensatory in nature, not punitive.

This analysis is consistent with Judge Magnuson's ruling that "CERCLA should be given a broad and liberal construction ... [and] should not be narrowly interpreted ... to limit the liability of those responsible for cleanup

costs beyond the limits expressly provided." United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). An award of prejudgment interest would be consistent with the congressional purposes of recovering all costs from responsible parties and replenishing the Superfund so that it may be used at other sites. */

Accordingly, both the statute and the case law recognize broad rights for the United States to recover past costs incurred in investigating and planning remedial measures at hazardous waste sites and in taking enforcement action. Moreover, such a result accords with the public policy goal of CERCLA to preserve the use of the fund for sites where no responsible parties may be found.

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*/ Courts have routinely awarded prejudgment interest in cases brought by the United States to recover the costs of removing oil from navigable water under section 311 of the Clean Water Act, 33 U.S.C. §1321. United States v. M/V Zoe Colocotroni, 602 F 2d. 12, 14 (1st Cir. 1979); United States v. Hollywood Marine, Inc. 519 F. Supp. 688 (S.D. Tex. 1981); United States v. Malitovski Cooperage Co., 472 F. Supp. 454, 458 (W.D. Pa. 1979). Congress modeled section 107 of CERCLA after section 311 of the Clean Water Act. In section 101(32) of CERCLA, 42 U.S.C. §9601(32), the term "liable" is defined to have the same meaning as under section 311 of the Clean Water Act.

II. REILLY IS LIABLE FOR THE COST INCURRED BY THE UNITED STATES IN THIS CASE

The United States has incurred approximately $2.3 million in past costs in this case since 1981. These costs fall squarely within the kinds of costs for which recovery was allowed by the court in United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. 823 (W.D. Mo. 1984); United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983); and other decisions cited in the previous section of this memorandum.

In Northeastern Pharmaceutical, supra, 579 F. Supp. at 851, the court summarized the four categories of response costs incurred by the government in that case for which the defendant was liable:

> (a) Investigations, monitoring and testing to identify the extent of danger to the public health or welfare or the environment.
>
> (b) Investigations, monitoring and testing to identify the extent of the release or threatened release of hazardous substances.
>
> (c) Planning and implementation of a response action.
>
> (d) Recovery of the costs associated with the above actions, and to enforce the provisions of CERCLA, including the costs incurred for the staffs of the EPA and the Department of Justice.

The costs incurred by the United States in connection with the Reilly site also fall within the above four categories. A brief

summary of the approximate costs incurred by the United States in this case is presented below. */

A. The United States awarded a $400,000 grant to the State of Minnesota in 1981 under the provisions of the Resource Conservation and Recovery Act ("RCRA"). This money was paid to contractors who performed two tasks: (1) the cleanout of Well W23, a well on the Reilly site which was filled with coal tar; and (2) the partial funding of a feasibility study for a drinking water treatment system to be installed at SLP 15, a well which was closed in 1979 because of contamination from the Reilly site.

B. The United States has incurred a total of $874,523, payable to the State of Minnesota under two CERCLA Cooperative Agreements. This total reflects costs actually incurred and billed by the State of Minnesota as of December 31, 1984. Additional expenses for 1985 are not yet available and are not included in this amount. The tasks performed under the CERCLA Cooperative Agreements fall into two broad categories:

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*/ The figures presented in this section have not been verified and are subject to revision. They are presented here as approximations for discussion purposes.

(1) Approximately $365,620 was spent on Interim Remedial Measures, including the cleanout of wells W23 and W105 by E.A. Hickok and Associates and the preparation of a feasibility study for a drinking water treatment system at well SLP-15 by by CH2M Hill and Barr Engineering Company. (Earlier work on feasibility study was paid through the RCRA grant mentioned above.)

(2) Approximately $508,903 was expended on tasks which included preparation of a groundwater model for use in the Prairie du Chien-Jordan aquifer by the U.S. Geological Survey; a data management system prepared by the Land Management Information Center; and State staff time connected with the remedial work performed under the Cooperative Agreement.

C. Also, as of March 28, 1985, the U.S. Environmental Protection Agency had incurred costs of approximately $754,742.82. These costs are in addition to the RCRA and CERCLA Cooperative Agreement costs discussed earlier. These costs include EPA salaries and expenses, expert witness contracts for remedial support, investigation, testing and analysis. For example, contracts were entered with Ecology and Environment, Inc., GCA Corporation, and NUS for field investigation. Roy F. Weston, Inc. provided remedial support to the EPA; the U.S. Geological Survey provided various investigative and analytical work pursuant to an interagency agreement between the USGS and EPA; and Acurex Corporation provided analytical services.

D. The U.S. Department of Justice has incurred litigation and enforcement related costs of approximately $280,171.63, as of December 31, 1984. These expenses were paid by the Superfund.

The total costs incurred by the United States as of December 31, 1984 (including EPA costs as of March 28, 1985), are approximately $2.3 million. Since there has been considerable litigation activity in this case since January 1, 1985, the government's total actual costs as of March 31, 1985, are certainly in excess of $2.3 million.

In sum, the above costs clearly fall within the categories f recoverable costs, as set forth in United States v. Northeastern Pharmaceutical and Chemical Corp., supra, 579 F. Supp. at 851. The United States, therefore, is entitled to full recovery of its past costs.

Respectfully submitted,

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SUMMARY OF COSTS OF THE UNITED STATES

REILLY TAR AND CHEMICAL CORPORATION SITE
ST. LOUIS PARK, MINNESOTA

1.	Resource Conservation and Recovery Act - Cleanout of W23 - Feasibility Study - Drinking water treatment at SLP 15	$ 400,000.00
2.	CERCLA Cooperative Agreements Between State of Minnesota and EPA (COSTS AS OF 12/31/84)	
	a. Interim Remedial Measures	
	1. Cleanout of W23 and W105 (E.A. Hickok and Associates)	$ 365,620.00 (as of 12/31/84)
	2. Feasibility Study - drinking water treatment at SLP 15 (CH2M Hill; Barr Engineering)	
	b. Feasibility Study/State Expenses - State salaries and expenses; data management; groundwater modeling; study and design of drinking water treatment system at SLP 15	$ 508,903.00
	TOTAL CERCLA Cooperative Agreement.....	$ 874,523.00
3.	U.S. EPA COSTS (Approximate - as of 3/28/85)	
		(All as of 3/28/85)
	a. EPA Payroll and Travel	$ 142,580.93
	b. Field Investigation Team Contract (E&E; NUS)	$ 57,753.04
	c. REM Contract (Remedial Support) (Roy F. Weston, Inc.)	$ 18,795.63
	d. National Lab Contract (EPA Lab; Acurex)	$ 252,846.42
	e. Expert Witness Contract	$ 165,661.74
	f. Technical Enforcement Support	$ 81,319.94
	g. Interagency Agreement (USGS)	$ 31,615.00
	h. Miscellaneous (Overflights, other)	$ 4,170.12
	TOTAL EPA COSTS as of 3/28/85.....	$ 754,742.82

4. U.S. Department of Justice Costs

Enforcement and Litigation (Including salaries and expenses of Department of Justice attorneys; expert witness contracts)

FY 1982:	$ 36,078.36
FY 1983:	$ 112,288.23
FY 1984:	$ 106,309.25
FY 1985 THROUGH December 31, 1984:	$ 25,495.79
TOTAL DOJ COSTS AS OF 12/31/84.....	$ 280,171.63

TOTAL COSTS OF UNITED STATES
(Subject to
(As of the Dates Noted Above):

RCRA	$ 400,000.00
CERCLA Cooperative Agreement	$ 874,523.00
EPA	$ 754,742.82
DOJ	$ 280,171.63
TOTAL U.S. COSTS.....	$ 2,309,437.45